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No. 85-6461

In the Supreme Court of the United States

OCTOBER TERM, 1985

EARLINE MARTIN, Petitioner,

vs.

STATE OF OHIO, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR OHIO PUBLIC DEFENDER COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The Ohio Public Defender Commission hereby respectfully moves for leave to file the attached brief **amicus curiae** in support of petitioner in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for respondent was requested but refused.

The interest of the Ohio Public Defender Commission in this case arises from the fact that it and other appointed counsel in Ohio represent many criminal defendants similarly situated to petitioner. The issue raised by petitioner of concern to **Amicus** is Ohio's requirement that the accused bear the burden of proving a claim of self-defense by a preponderance of evidence. **Amicus** represents the interests of a large number of Ohio attorneys who believe that Ohio law on this issue is in conflict with the Due Process Clause of the Fourteenth Amendment.

In the instant case, **Amicus** believes the resolution of this issue will depend on whether this Court finds that self-defense negates any facts necessary to prove the crime of aggravated murder under Ohio law. See

Patterson v. New York, 432 U.S. 197, 206-207. While petitioner's argument broadly addresses this issue, **Amicus** believes that the brief he is requesting permission to file will contain a more detailed analysis of the pertinent elements of Ohio law and their relationship to self-defense. Additionally, the brief **amicus curiae** contains a discussion of where the federal courts and other states stand on this issue, not contained in petitioner's brief.

For these reasons, **Amicus** requests leave to file the attached brief **amicus curiae** in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of March, 1986, three copies of the foregoing Motion for Leave to File Brief **Amicus Curiae** and Brief **Amicus Curiae** were mailed, first-class postage prepaid, to James R.

Willis, Esq., Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to John T. Corrigan, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

GREGORY L. AYERS
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INTEREST OF AMICUS CURIAE

The Ohio Public Defender Commission was created by Ohio law in 1976. Its purpose is to provide, supervise, and coordinate legal representation at state expense for indigent and other persons. Ohio Revised Code Section 120.01. One of our primary responsibilities is to provide legal representation to criminal defendants in felony trials, appeals and post-conviction matters. Additionally, the Commission provides technical aid and assistance in criminal cases to county public defenders and appointed counsel throughout the State of Ohio. As a result, the Commission is concerned with the case at bar and all other cases relating to criminal law and procedure which affect the rights of criminal defendants. Petitioner's written consent to the Commission's filing a

brief **amicus curiae** in support of petitioner has been filed with the Clerk's office. Respondent's consent was requested but refused.

The Commission has represented clients in criminal cases before this Court, the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Courts for the Northern and Southern Districts of Ohio, respectively. The Commission has also filed **amicus** briefs in various Ohio courts in other actions which involved the rights of criminal defendants.

The instant case is of interest to the Commission and its attorneys for several reasons. To begin with, this is an Ohio case and involves interpretations of Ohio law. The issue presented by this case further involves

the State of Ohio's power to define criminal conduct in a homicide case and legitimately place the burden of proof on the accused of showing that she acted lawfully in self-defense. The resolution of this issue will directly affect how Commission attorneys and other members of the criminal defense bar in Ohio handle cases involving the issue of self-defense. Finally, other Ohio defendants, similarly situated to petitioner herein, are being represented by Commission attorneys and will be directly affected by the outcome herein.

SUMMARY OF ARGUMENT

The **Amicus** submits that the decision below is erroneous for three primary reasons. First, the defense of self-defense, if present in a criminal case, establishes that the actor was engaged in lawful, innocent behavior.

Since this Court's decision in **In re Winship**, 397 U.S. 358 (1970), prohibits the State from requiring a defendant to prove her innocence, the State of Ohio is barred from burdening Ms. Martin with proving self-defense.

Second, under an elements analysis stemming from **Mullaney v. Wilbur, 421 U.S. 684 (1975), and Patterson v. New York**, 432 U.S. 197 (1977), self-defense negates several elements of the crime of aggravated murder; to wit:

1. criminal conduct;
2. criminal intent (purposely, with prior calculation and design)[**see** Revised Code Section 2903.01(A)];
3. voluntary act requirement [**see** Revised Code Section 2901.21(C)];
4. "peace and dignity" requirement

of the Ohio Constitution [Article IV, Section 20 and Revised Code Section 2941.06];

5. unlawfulness.

Finally, **Amicus** submits that an examination of the Ohio Supreme Court's decision below establishes that the Court misperceived the letter and spirit of **Mullaney/Patterson.** In its attempt to fall within **Mullaney/Patterson**, the Ohio Supreme Court misused the term "justification" for criminal conduct and blindly applied the label "affirmative defense" as if to insulate from closer scrutiny the very nature of the defense asserted. Labels notwithstanding, the common law of Ohio treats justifiable homicide as a lawful act. As a lawful act, the burden of proof may never lie with the Petitioner, but rather self-defense must be negated by the State of Ohio.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE STATE MAY CONSTITUTIONALLY REQUIRE THE ACCUSED IN A HOMICIDE CASE TO PROVE THAT SHE ACTED LAWFULLY IN SELF-DEFENSE.

This case presents this Court with the opportunity to draw a bright line as to the parameters of a state's power to define its crimes. This Court has long held that it is the business of the states to deal with and prevent crime. **Irvine v. California**, 397 U.S. 128, 134 (1954). Nonetheless, if, in the exercise of this plenary power, the state violates a principle deeply rooted "in the traditions and conscience of our people as to be ranked as fundamental", that act is unconstitutional. **Patterson v. New York**, 432 U.S. 197, 202 (1977), [citations omitted].

Relevant to the case at bar are two principles born from **Mullaney v. Wilbur**, 421 U.S. 684 (1975); **Patterson, supra**; and **Sandstrom v. Montana**, 442 U.S. 510 (1979). First, a state may not set forth elements of a crime and then obtain the benefit of a presumption on any of those elements. Second, it is clear that the state may not establish elements and then burden the defendant with negating those elements, even though the elements were proven by the state. The case at bar is concerned with both principles arising from **Mullaney, supra**; **Patterson, supra**; and **Sandstrom, supra**.

Mullaney dealt with a charge of murder under Maine law. In order to convict on that charge, the State had to prove that the killing was unlawful and intentional. The Supreme Court of Maine

had held that these were the only two elements. **See State v. Lafferty**, 309 A.2d 647, 664 (Me. 1973)[malice is not an element of murder]. However, the Maine Supreme Court, in **Lafferty**, held that "a killing becomes unlawful and punishable as 'murder' on proof of 'any deliberate, cruel act, committed by one person against another, suddenly without any or without a considerable provocation'" (emphasis added). **Id.** at 665. Mr. Wilbur, however, had been burdened with proving "heat of passion" by a preponderance of the evidence in order to mitigate the crime to manslaughter.[1] Under Maine law, the act

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[1] In relevant part, that statute read:

> Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought... Me. Rev. Stat. Ann. Tit. 17 Section 2551 (1964).

of killing one "in the heat of passion, on sudden provocation" negated the intent element of the crime of murder.

Since heat of passion negated "intent" under the Maine statute, this Court held that the State was required to prove "beyond a reasonable doubt the absence of the heat of passion or sudden provocation when the issue is properly presented in a homicide case". Id. at 704.

Two things are evident from **Mullaney.** First, a state's interpretation of its own laws will be binding on this Court, absent "subterfuge". **See also Patterson, supra** at 691. Second, while the Court will begin its inquiry on the constitutionality of the burden-shifting issue by looking to the words of the statute, it will ultimately look to the

way in which the words are defined to determine whether there is an unconstitutional shifting of the burden of proof. This latter point is manifest since the fact that "heat of passion" negated intent did not appear on the face of the Maine statutes. Rather, this was determined by looking to the judicial gloss placed on intent and heat of passion by the Maine courts.

Patterson, supra, further amplified this analysis. In New York, the crime of second-degree murder was defined as requiring the state to prove "(1) intent to cause the death of another person; and (2) causing the death of such person or of a third person". **Patterson, supra**, at 198 [citing New York Penal Law Section 125.25]. New York law, however, provided that if the defendant carried the burden of proving that the killing

was done "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse", the charge could be mitigated to manslaughter in the first degree. **Id.** at 198-199. In its review of New York law, the Court determined that the affirmative defense established "a mental infirmity not arising to the level of insanity..." **Id.** at 206 [quoting from **People v. Patterson,** 39 N.Y.2d 288, 302, 347 N.E.2d 898 (1976)]. Since the burden of proving insanity could constitutionally be placed on the defendant [**see Leland v. Oregon,** 393 U.S. 790 (1952)] and the affirmative defenses did not "serve to negative any facts of the crime" which the state was required to prove to convict on murder, the burden allocation was permissible.

Based upon **Patterson** and **Mullaney, supra**, the analysis appropriate to this case is:

(1) identify the elements of the crime to be proven;

(2) consider whether the State of Ohio presume any element of the crime charged;

(3) determine the relationship of affirmative defense to the crime charged; and

(4) determine if the affirmative defense negates any fact the State must prove.

The relevance of this analysis to the case **sub judice** is quite direct. Here, the Ohio Supreme Court essentially held that burdening the defendant with proving the defense of self-defense passes constitutional muster for the following reasons:

(1) the State was required to prove all of the elements of the crime charged (purposely, prior calculation and design, causing death)[**State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 168 (1986)];

(2) the United States Supreme Court's holding in **Patterson** did not require the State to disprove all affirmative defenses [Id. at 93];

(3) since self-defense contains facts which may be peculiarly within the defendant's knowledge, it would be too onerous to require the State to disprove those facts [Id. at 94]; and

(4) self-defense does not negate any elements of the offense

with which Ms. Martin was charged [**Id.**].

The first three grounds for the decision below are of little consequence. The mere fact that the jury is instructed that the State bears the burden of proof on all elements beyond a reasonable doubt merely brings the State in conformance with **In re Winship, supra.** Thus, this factor simply states the obvious. Second, this Court has never held that labeling a defense as an affirmative defense allows the State to burden the defendant with proving that defense. Certainly, such a proposition would elevate form over substance, a proposition soundly rejected in **Mullaney, supra,** at 699. This Court has never advocated a view of the law that would allow the use of labels to short circuit a functional

analysis. Third, the characterization of self-defense as a defense peculiarly within the knowledge of the defendant cannot justify placing the burden of proof on the defendant. That a fact may be within the knowledge of the defendant is insufficient to justify shifting the burden of proof to the defendant. **Mullaney, supra,** at 702. Even though the State may be required thereby to prove a "negative" of a fact likewise is of no consequence. **Id.** at 702, n. 31. The **Mullaney** Court soundly rejected this same rationale posited by the State of Maine:

> No doubt this is often a heavy burden for the prosecution . The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential. **Id.** at 701.

Since the first three rationales are of little significance, this Court must then consider whether the Ohio Supreme Court was correct when it held that self-defense negates no elements of the crime of aggravated murder. In beginning this inquiry, there can be no doubt that if the defense "serves to negative any facts of the crime which the State is required to prove", the defendant cannot be burdened with proving the defense. **Patterson** at 206-207. Stated differently, if the existence or nonexistence of the defense bears a necessary relationship to the elements of the crime, the State must carry the burden of negating the defense. **Mullaney, supra**, at 706 (J. Rehnquist, concurring).

Looking to the face of the statute, the common-law view of those elements

contained therein and the nature of self-defense, **Amicus** submits that self-defense negates various elements of the crime of aggravated murder.

Both the Federal courts, Devitt and Blackman, Federal Jury Practice and Instruction (3d ed. 1977) Section 41.19, and a "substantial majority of the States", **State v. Kirtley**, 252 S.E.2d 374, 380 (W. Va. 1978), require that once self-defense is properly placed in issue, the government must prove the defendant was guilty by proving that he did not act in self-defense. Indeed, it would appear that prior to **Mullaney v. Wilbur, supra**, there were--excluding Ohio--11 jurisdictions which attempted to make an accused bear the burden of proving self-defense by at least a pre-

ponderance of the evidence.[2] Since 1975, at least nine of those states [Delaware,[3] Georgia,[4] Kentucky,[5]

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[2]These jurisdictions were: Delaware; Georgia; Kentucky; Maryland; North Carolina; Pennsylvania; Rhode Island; South Carolina; Tennessee; Texas; and West Virginia. **See** Anno., "Homicide: Modern Status of Rules As To Burden and Quantum of Proof to Show Self-Defense", 43 A.L.R.3d 221, 226-227 (1972). This list includes only those states which placed a burden of proof (as opposed to a burden of going forward) upon the accused by at least a preponderance.

[3]**Hamilton v. State,** 343 A.2d 594 (Del. 1975)[recognizing statutory change].

[4]**See Henderson v. State,** 234 Ga. 827, 218 S.E.2d 612 (1975)[state admitted constitutional error in placing the burden of proof of self-defense on defendant].

[5]**See** Kentucky Revised Statutes, Section 503.050 (recognizing self-defense as justification) and Commentary to K.R.D. Section 503.020 [once the defendant raises the issue of justification, "the prosecution must bear the ultimate burden of persuading the jury that the defendant was not justified"].

Maryland,[6] North Carolina,[7] Pennsylvania,[8] Rhode Island,[9] Texas,[10] and West Virginia,[11]] have abandoned that approach and adopted the view that once self-defense is placed in issue, the burden is upon the state to prove that

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[6] **State v. Evans**, 362 A.2d 629 (Md. 1976)[after **Mullaney** could not constitutionally require defendant to bear burden of proof on self-defense as justification].

[7] **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975)[self-defense negates the unlawfulness element of murder], **rev'd on other grounds sub.nom. Hankerson v. North Carolina**, 432 U.S. 233 (1977).

[8] **Commonwealth v. Hilbert**, 382 A.2d 724 (Pa. 1978) [self-defense negates unlawfulness and malice].

[9] **In re Doe**, 120 R.I. 732, 390 A.2d 920 (1978) [self-defense negates unlawful-ness]. **Accord: State v. Baker**, 417 A.2d 906 (R.I. 1980).

[10] **Luck v. State**, 588 S.W.2d 371 (Tex. 1979), **cert. denied** 446 U.S. 994 (1980)[under Texas code state must disprove self-defense beyond a reasonable doubt].

[11] **State v. Kirtley, supra**, [once properly placed in issue, state must prove defendant did not act in self-defense--based upon state law and not due process].

the accused did not act in self-defense.

Amicus is unable to find any dispositive authority from Tennessee.[12] The remaining jurisdiction, South Carolina, continues to adhere to the position that there is no constitutional infirmity in requiring the accused to bear the burden of proof of self-defense,[13] but its instructions on this issue have recently been held unconstitutional by the Fourth Circuit.[14] Thus, it would appear that

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[12] **See, e.g., State v. Wilson**, 556 S.W.2d 232, 234 (Tenn. 1977)[defendant "must show" he acted in self-defense (no indication as to whether this involves a burden of persuasion or only a burden of production)].

[13] **See Thomas v. Leeke**, 547 F. Supp. 612 (D.S.C. 1982) and South Carolina state cases collected therein.

[14] **Thomas v. Leeke**, 725 F.2d 246 (4th Cir. 1984)[reversing the District Court on the grounds that the South Carolina instructions that the State bore the burden of proof on guilt and the defendant bore the burden of proof on self-defense was contradictory].

Ohio stands alone in its attempt to force the accused to prove innocence by proving self-defense.

It has long been accepted that an accused was presumed innocent; that the State was required to prove guilt beyond a reasonable doubt; and that the accused could not be required to prove innocence. Since **In re Winship**, 397 U.S. 358 (1970), prohibits the State from requiring an accused to prove her innocence, and if one acting in lawful self-defense is innocent, then the State of Ohio cannot justify imposing the burden of proof upon self-defense upon Petitioner Martin. Moreover, since **Mullaney v. Wilbur, supra**, prohibits the State from making an accused prove a "defense" which would negate a single element of the crime, it necessarily follows that the State cannot justify

making the accused prove a "defense" which negates the entire crime.

On an "elements" analysis, breaking the crime of aggravated murder down into its sub-parts, the result is the same: self-defense negates a variety of elements. Those elements are:

1. Criminal Conduct--It is axiomatic that the State can only punish criminal conduct. **E.g., Robinson v. California**, 370 U.S. 660 (1962). As set forth above, killing another in self-defense is lawful conduct which establishes that no crime has been committed.

2. Criminal Intent--Ohio law requires that for an act to be criminal there must be a "blame-worthy" mental state: a "guilty state of mind". **See** Legislative Committee Comments to Ohio Revised Code Sections 2901.21 and

2901.22. This is consistent with federal constitutional requirements. **E.g., Powell v. Texas,** 392 U.S. 514 (1968); **Gay v. United States,** 408 F.2d 923 (8th Cir. 1969), **cert. denied** 396 U.S. 823 (1969).

A person who acts in lawful self-defense cannot be said to have a state of mind which is either "blame-worthy" or "guilty". Indeed, Ohio cases speaking to this issue have specifically held that proof of self-defense is inconsistent with the **mens rea** required to make one culpable of homicide. **State v. Clifton,** 32 Ohio App.2d 294, 286, 287, 290 N.E.2d 921 (1972); **State v. Robinson,** 48 Ohio App.2d 197, 206, 209, 356 N.E.2d 725, 731, 732 (1975)(Whiteside, concurring), **aff'd on other grounds,** 47 Ohio St.2d 103, 351 N.E.2d 88 (1976).

In this case, the State of Ohio was required to prove, in addition to "purpose", or **mens rea**, the elements of prior calculation and design. Under Ohio law, these elements go beyond the traditional common-law definition of premeditation and deliberation:

> Syllabus 2. Instantaneous deliberation is not sufficient to constitute 'prior calculation and design'.
>
> Syllabus 3. Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.
>
> **State v. Cotton**, 56 Ohio St.2d 8, 381 N.E.2d 186 (1978).

Since self-defense is an instinctive act and reflexive, a killing in self-defense

defense would negate the elements of prior calculation and design.

3. The Voluntary Act Requirement--Ohio Revised Code Section 2901.21(C) requires that acts be voluntary before criminal liability attaches. Actions taken in self-defense are based upon "the 'instinct' for self-preservation and arise 'spontaneously'". **Stoffer v. State**, 15 Ohio St. 47, 52-53 (1864), **overruled on other grounds, Meade, et al. McGraw**, 19 Ohio St. 55, 62 (1869).

> A legitimate act of self-defense is much more a mere reflex action than one committed voluntarily (emphasis added).
> **State v. Hardy**, 60 Ohio App.2d 325, 329, 397 N.E.2d 773, 776 (1978).

4. The Peace and Dignity Requirement--The Ohio Constitution requires that all indictments allege that the acts complained of were

"against the Peace and Dignity of the State of Ohio." Article IV, Section 20, Ohio Constitution. **See also,** Ohio Revised Code Section 2941.06. The "manifest object" of this requirement is to provide:

> [A] sufficient and uniform conclusion to the allegations of fact constituting the charge.
> **State v. Stapley,** 19 O.D. (N.P.) 110, 111 (Hamilton Cty. C.P. Ct. 1908)(emphasis added).

See also, State v. Nieto, 101 Ohio St. 409, 428, 130 N.E. 663 (1920)(Wanamaker, J., dissenting on other grounds).

Since action taken in self-defense is not illegal, it cannot be against the Peace and Dignity of the State of Ohio. Consequently, proof that the conduct was in self-defense would negate the Peace and Dignity element.

5. Unlawfulness--"By definition, the indictment for a criminal offense must therefore charge the general

allegations of unlawfulness of the conduct of the defendant in addition to the specific elements which constitute the criminal offense". **State v. Simon**, No. 6262 (2nd Dist. Ct. App., Jan. 6, 1980) at 13. This necessity for proving unlawfulness is preserved even where the language is not specifically mentioned in the statute. **State v. Stout**, 49 Ohio St. 270, 282-282, 30 N.E. 437 (1892). Moreover, the peace and dignity allegation required by the Ohio Constitution is itself a claim that the conduct was "unlawful". **Hamilton v. Alvis**, 109 Ohio App. 298, 301, 160 N.E.2d 372 (1959). **See State v. Nieto, supra. See also**, Revised Code Section 2941.10 [the fact of the indictment constitutes an allegation that no legal excuse exists for the act].

Ohio cases have uniformly recognized that proof of self-defense would negate the element of unlawfulness and utilized what is now an unconstitutional presumption to place the burden of proof of self-defense on the defendant. **E.g., Silvus v. State**, 22 Ohio St. 90 (1871); **State v. Robinson**, 161 Ohio St. 213, 118 N.E.2d 517 (1954); **State v. Kinnemore**, 34 Ohio App.2d 39, 295 N.E.2d 680 (1972). Indeed, the Ohio Supreme Court below characterized the affirmative defense of self-defense as a "justification for admitted conduct". **Martin**, 21 Ohio St.3d at 94. **See also, Thomas v. Arn**, 704 F.2d 865, 877 (6th Cir. 1983)("[Ohio's] use of the terms 'excuse' and 'justification' strongly implies that a criminal offense has been committed--i.e., that all elements of a

crime have been proved beyond a reasonable doubt and that the perpetrator will be criminally liable unless an 'excuse' or 'justification' for his conduct is presented"). **Amicus** submits that a plea of self-defense plainly denies, rather than admits, that the elements of a crime have been established. Thus, under Ohio law a lawful act of self-defense is presumed to be unlawful unless the accused establishes his innocence.

There also seems to be some confusion over the terms "excuse" and "justification". While the Ohio courts seem to use these terms interchangeably, at common law the terms carried very real definitional differences. **See Erwin v. State**, 29 Ohio St. 186 (1876).

Excusable homicide resulted in the forfeiture of goods, while justifiable homicide resulted in a complete acquittal free from any sort of forfeiture. **Erwin, supra,** at 195. A further distinction was that an excusable homicide would be found where no actual danger existed. Justifiable homicide, on the other hand, would be found where actual danger was present. **Erwin, supra,** at 198-199. A finding of "justified" homicide, however, constituted a finding that the act of self-defense was lawful.

However, to the extent this type of "elements analysis is used, those arguing for the constitutionality of Ohio's statutory scheme find themselves in conflict with the judgment of the

Fourth Circuit examining Maryland law;[15] the Fourth Circuit examining North Carolina law;[16] the Fourth Circuit examining South Carolina law;[17] the Fifth Circuit examining Georgia law;[18]

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[15] **Guthrie v. Warden**, 683 F.2d 820 (4th Cir. 1982)[Maryland law: self-defense exonerates an accused of any degree of culpable homicide].

[16] **Wynn v. Mahoney**, 600 F.2d 448 (4th Cir.), **cert. denied** 444 U.S. 950 (1979)[North Carolina law: self-defense negates unlawfulness].

[17] **Sarah Thomas v. William D. Leeke**, 725 F.2d 246 (4th Cir. 1983). Though the decision in this case is based upon a finding of confusion between the instructions upon the state's burden to prove guilt beyond a reasonable doubt and the defendant's burden to prove self defense, it is clear that the underlying problem was that the Court found self-defense to be inconsistent with guilt.

[18] **Tennon v. Ricketts**, 642 F.2d 161 (5th Cir. 1981)[Geogia law: self-defense negates unlawfulness]; **Holloway v. McElroy**, 632 F.2d 605 (5th Cir. 1980), **cert. denied** 451 U.S. 1028 (1981)[Georgia law: self-defense negates unlawfulness].

and the Eleventh Circuit examining Georgia law.[19]

The only Circuit cases which would arguably contradict this position involve the law of Virginia where the defendant has the burden of production (not the burden of proof) to raise a reasonable doubt as to self defense.[20] The only Federal authority which is directly contrary is based upon South Carolina law. **See Thomas v. Leeke**, 547 F. Supp. 612 (D.S.C. 1982), and South

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[19] **See Lamb v. Jernigan** , 683 F.2d 1332, 1336 (11th Cir. 1982), **cert. denied** 460 U.S. 1024 (1983)[Georgia law: self-defense negates malice](**dicta**).

[20] **Frazier v. Weatherholtz**, 572 F.2d 994, 995 (4th Cir. 1978), **cert. denied** 439 U.S. 876 (1978)[Virginia law: no infirmity in requiring defendant to establish self-defense "to the extent of raising...a reasonable doubt as to whether or not he acted in the lawful exercise of such right"]; **Baker v. Muncy**, 619 F.2d 327 (4th Cir. 1980)[Virginia law: following **Frazier**].

Carolina state decisions cited therein. That opinion, however, was reversed by the Fourth Circuit, 725 F.2d 246 (4th Cir. 1984), using an analysis identical to that utilized by Judge Jones in his dissent in **Cherry v. Jago**, 722 F.2d 1296 (6th Cir. 1983), **cert. denied** ___U.S.___, 104 S.Ct. 3518 (1984).

It is therefore noteworthy that in **Sarah Thomas v. William D. Leeke**, 725 F.2d 246 (4th Cir. 1984), the Fourth Circuit has recently considered instructions that are analogous to those given in Petitioner Martin's case, and concluded that due process is violated because there are inherent contradictions between the trial court's instructions that the State must bear the burden of proof beyond a reasonable doubt and that the defendant must bear the burden of proof by a preponderance

on self-defense. It appears that the Fourth Circuit's decision is predicated upon the very rationale advanced by Judge Jones in his dissent in **Cherry v. Jago, supra.** Thus, the Ohio Supreme Court's decision in Petitioner's case is in direct conflict with the decisions of most other courts on this fundamental constitutional question.

CONCLUSION

For the reasons stated above and those contained in Petitioner Martin's Petition for Writ of Certiorari, **Amicus** prays that this Court grant certiorari and find that Ohio's burdening the defendant with proving self-defense is unconstitutional.

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of March, 1986, three copies of the foregoing Brief For Ohio Public Defender Commission As **Amicus Curiae** In Support Of Petitioner were mailed, first-class postage prepaid, to James R. Willis, Esq., Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to John T. Corrigan, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State

Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

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